

T. H.)	
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Claimant-Respondent)	
)	
v.)	
)	
PITTSBURGH & CONNEAUT DOCK)	DATE ISSUED: 05/27/2009
COMPANY)	
)	
and)	
)	
SIGNAL MUTUAL IMDEMNITY)	
ASSOCIATION, LIMITED)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Steven C. Schletker, Covington, Kentucky, for claimant.

Lawrence P. Postal (Seyfarth Shaw LLP), Washington, D.C., for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2007-LHC-01579) of Administrative Law Judge Alice M. Craft rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary, and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant underwent the first of two surgeries on October 31, 2003, for bilateral carpal tunnel syndrome. Employer voluntarily paid compensation for temporary total disability and provided medical benefits. 33 U.S.C. §§907(a), 908(b). On April 5, 2004, claimant returned to work where he experienced shooting pains from his neck to his hands. Claimant continued working until July 16, 2004, when he presented employer with a medical restriction slip prohibiting him from operating a bulldozer. Employer was unable to accommodate claimant's restriction. Claimant filed a claim for compensation under the Act on July 20, 2004, alleging a cumulative trauma injury to his neck, back, and shoulders. CX U. Employer did not accept the claim until October 29, 2004, when it initiated payments for temporary total disability retroactively from July 16, 2004. EX 4. Employer informed the district director's office and claimant in 2006 that it would retroactively reduce claimant's compensation payments based on a May 24, 2005, labor market survey. *See* 33 U.S.C. §908(e). An informal conference was held on March 15, 2007, to discuss the nature and extent of claimant's cervical condition. The claims examiner recommended that employer pay claimant compensation for permanent total disability, 33 U.S.C. §908(a), because employer's labor market survey did not identify the availability of suitable alternate employment and claimant's work injury had reached maximum medical improvement. CXs W, X. Employer responded by controverting the claim, contending that claimant's neck disability is not related to his employment and that he is not totally disabled. CX S.

The district director referred the case to the Office of Administrative Law Judges on June 7, 2007. Prior to the formal hearing, the parties stipulated to the outstanding issues. On December 6, 2007, the administrative law judge issued an Order accepting the parties' stipulations, *inter alia*, that claimant is entitled to 19.52 weeks of permanent partial disability compensation for his bilateral carpal tunnel syndrome, 33 U.S.C. §908(c)(3), continuing permanent partial disability compensation of \$634.11 per week for his neck condition, 33 U.S.C. §908(c)(21), and medical benefits for his work-related injuries.

Claimant's counsel thereafter submitted to the administrative law judge a fee petition requesting an attorney's fee of \$11,810, representing two hours at \$175 per hour, and 57.2 hours at \$200 per hour, plus costs of \$4,257.41. Employer filed objections, to which claimant replied.

In her Decision and Order, the administrative law judge found that the hourly rates requested are reasonable in view of counsel's experience and the issues presented by the case. The administrative law judge rejected employer's contention that claimant's counsel prevailed only in increasing claimant weekly compensation rate from \$580.78 to \$634.11. The administrative law judge found that employer disputed causation and the nature and extent of claimant's bilateral carpal tunnel and neck conditions, and that

claimant's counsel succeeded in obtaining an ongoing compensation benefit of \$634.11 per week and medical benefits for both work injuries. The administrative law judge rejected employer's contention that it cannot be held liable for any attorney's fee pursuant to Section 28(b), 33 U.S.C. §928(b), for time expended obtaining a permanent partial disability award for claimant's carpal tunnel condition because an informal conference was not held on that issue. The administrative law judge found that employer stipulated that claimant's counsel is entitled to a fee payable by employer subject only to the provisions found in Section 702.132, 20 C.F.R. §702.132. The administrative law judge addressed employer's objection to 29 specific items in the fee petition, and she reduced a total of 5.2 hours from eight entries. Finally, the administrative law judge rejected employer's objection to claimant's counsel's costs. Accordingly, the administrative law judge awarded claimant's counsel a fee totaling \$10,750, plus costs of \$4,257.41.

On appeal, employer contends that the administrative law judge erred by finding that it is liable for a fee for time expended by claimant's counsel to obtain the permanent partial disability award for claimant's carpal tunnel condition. Employer also asserts the administrative law judge failed to address its contention that claimant's counsel failed to exercise billing judgment, and that the administrative law judge erred by not adequately addressing its objections to specific items in the fee petition. Claimant responds, urging affirmance of the fee award.

Employer asserts that it did not waive its right to object under Section 28(b) to time expended by claimant's attorney to secure a permanent partial disability award for claimant's bilateral hand condition. In her decision, the administrative law judge found that employer stipulated that claimant's counsel is entitled to an attorney's fee payable by employer subject only to the provisions found in Section 702.132. Decision and Order at 3. Therefore, the administrative law judge concluded that employer cannot rely on the absence of an informal conference with regard to the carpal tunnel injury. *See Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007)

We reject employer's contention of error. In her December 6, 2007 Order, the administrative law judge accepted the parties' stipulation that, "[C]laimant's counsel is entitled to attorney's fees and costs to be paid by the employer based upon the criterion set forth in 20 CFR §702.132 . . . The employer shall have 20 days after receipt of the attorney fee petition to submit any objections." Order at 2 (emphasis added). The administrative law judge rationally found, based on this stipulation, that employer was limited to objecting to any fee petition on the basis of Section 702.132 and, therefore, waived its right to object to its fee liability pursuant to Section 28(b). Moreover, the administrative law judge properly found employer to be bound by its stipulation. *See*

Simonds v. Pittman Mechanical Contractors, Inc., 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Truitt v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 79 (1987). Therefore, we affirm the administrative law judge's finding that employer is liable for a fee for attorney services related to claimant's carpal tunnel syndrome.¹

Employer next contends that the administrative law judge failed to address its contention that claimant's counsel did not exercise billing judgment. We reject this contention. Contrary to employer's assertion that the sole disputed issue was claimant's post-injury wage-earning capacity, the administrative law judge properly found that employer controverted the cause of claimant's injuries and the nature and extent of his disability therefrom. CXs S, T. The administrative law judge found that claimant prevailed in obtaining a scheduled permanent partial disability award for his bilateral carpal tunnel condition, ongoing permanent partial disability benefits of \$634.11 per week for his neck condition, and open medical benefits to treat these work injuries. Decision and Order at 2-3. The administrative law judge specifically rejected employer's contention that claimant prevailed only in increasing claimant's permanent partial disability benefits from \$580.78 to \$634.11 per week.² Decision and Order at 3. As the administrative law judge's findings are rational and the fee award takes into account the degree of claimant's success on contested issues, we reject employer's contention that the administrative law judge did not address its "billing judgment" objection. *See Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3^d Cir. 2001); *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000).

Finally, employer argues that the administrative law judge failed to adequately explain the basis for her rejection of its objections to itemized entries. The administrative law judge listed employer's 29 objections to specific entries in the fee petition and claimant's counsel's responses to the objections. The administrative law judge individually addressed each of employer's objections. The administrative law judge found the time claimed reasonable in most instances, but she reduced eight entries by a total of 5.2 hours. Decision and Order at 3-7. The administrative law judge is required to

¹ Moreover, employer's contention that it never controverted claimant's claim that he sustained a work-related carpal tunnel injury and resulting permanent partial disability is rejected. Employer filed an LS-207, Notice of Controversion of Right to Compensation, on June 27, 2007, disputing causation and nature and extent of claimant's bilateral carpal tunnel condition. CX T.

² We note that, contrary to employer's contention, the administrative law judge put the burden of proof on claimant's counsel to show that time expended was reasonable and necessary under Section 702.132. Decision and Order at 3.

evaluate the fee petition in light of employer's objections, the degree of claimant's success, the amount of benefits obtained, the quality of the representation, and the complexity of the issues involved in the case. *See generally Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997); *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999); 20 C.F.R. §702.132(a). The administrative law judge fully considered each of employer's objections, as well as claimant's counsel's response thereto, and employer has failed to establish an abuse of the administrative law judge's discretion in determining the number of compensable hours. *See Moyer*, 124 F.3d at 1378, 31 BRBS at 134(CRT); *Pozos v. St. Mary's Hosp. & Med. Ctr.*, 31 BRBS 173, 178 (1997). We therefore affirm the administrative law judge's attorney's fee award.

Claimant's counsel has filed a fee petition for time expended before the Board in which he requests a fee of \$4,400 for 22 hours of attorney services at an hourly rate of \$200. Employer filed objections to the fee request, to which claimant has replied. Claimant is entitled to an attorney's fee payable by employer for successfully defending against employer's appeal. *See Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); 20 C.F.R. §802.203(a). We find that the hourly rate of \$200 requested by counsel is reasonable in this case. *B&G Mining, Inc., v. Director, OWCP*, 522 F.3d 657, 42 BRBS 25(CRT) (6th Cir. 2008). We reject employer's contention that claimant's counsel failed to disclose the hourly rate he charges paying clients. The fee petition states that, "the undersigned's approved and normal billing rate is \$200 per hour." Claimant's Attorney Fee Application at 2. This statement is sufficient to fulfill the regulatory criteria that counsel state his normal billing rate.³ *See* 20 C.F.R. §802.203(d)(4). Attorney Schletker's fee petition itemizes 22 hours for work performed before the Board, 20.3 of which were expended drafting claimant's 18-page response to employer's appeal of the administrative law judge's attorney fee award. We reject employer's contention that claimant's counsel failed to exercise billing judgment in defending the fee award. Employer challenged the fee award on multiple grounds, and counsel was entitled to respond to each contention. In light of claimant's complete success defending against employer's appeal, employer's suggestion that claimant's requested fee of \$4,400 is somehow too high since the administrative law judge's fee award was "under \$16,000" lacks merit. *See Hensley*, 461 U.S. 424; *Barbera*, 245 F.3d 282, 35 BRBS 27(CRT). However, we agree with employer that the amount of time expended to draft the response brief is excessive, and we reduce

³ Moreover, claimant's counsel submitted specific information to the administrative law judge regarding the hourly rate charged paying clients in response to employer's identical objection to the administrative law judge.

4.3 of the 20.3 hours requested related to this task.⁴ *See Malone v. Howard Fuel Co.*, 16 BRBS 364 (1984). Finally, employer argues that it is not liable for an attorney fee under Section 28(b) because defending employer's appeal did not benefit claimant since the only issue is the administrative law judge's attorney fee award. We reject this contention. Attorney's fees awarded under the Act should not be diminished by the cost of successfully defending a legitimate attorney fee award. *See Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003); *Kerns v. Consolidation Coal Co.*, 247 F.3d 133 (4th Cir. 2001); *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). Accordingly, counsel is awarded a fee of \$3,540, representing 17.7 hours at \$200 per hour for work performed before the Board to be paid directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order is affirmed. Claimant's counsel is awarded a fee of \$3,540 for work performed before the Board payable directly to counsel by employer.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

⁴ For example, claimant's counsel requested .3 hours to research the appropriate standard of review, which is unnecessary in that claimant's counsel states that he has tried numerous cases under the Act since 1983.